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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

VICTOR PRAXEDIS,

Defendant and Appellant.

G049546

(Super. Ct. No. 11CF1025)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Dan McNerney, Judge. Affirmed.

Eric S. Multhaup, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr., Anthony DaSilva, and Martin E. Doyle, Deputy Attorneys General, for Plaintiff and Respondent.

Victor Praxedis appeals from a judgment after a jury convicted him of first degree murder and street terrorism, and found true street terrorism and weapon enhancements. Praxedis argues the admission of gang expert testimony violated his Sixth Amendment confrontation rights and usurped the jury's role as the exclusive trier of fact. As we explain below, if there was a constitutional error, Praxedis was not prejudiced, and the expert did not usurp the jury's role by testifying as to Praxedis's intent or his guilt. We affirm the judgment.

FACTS

About 3:00 a.m. one April morning in 2011, Juan Pacheco and two friends, Michael Osoirio and Israel Cervantes, were at a taqueria in Santa Ana after they drank at a nightclub. They ordered food, sat down, and ate. Praxedis was also at the taqueria with his friends, Anthony Hernandez, Kevin Garcia, Eduardo Ortega, Ulises Mejia, and Christopher Espino.

Osoirio spoke to and motioned to a young woman who walked by. Hernandez approached Osoirio and spoke to him in a confrontational manner. Hernandez asked them "where [they] were from[,]" which Cervantes understood to mean were they gang members; they were not. Osoirio and Cervantes tried to diffuse the situation. After Osoirio and Cervantes stood up, four of Hernandez's confederates joined him, including Praxedis. Osoirio walked away to get a security guard who he knew worked there. Praxedis removed a knife from his pants pocket and opened the blade as his cohorts assaulted Pacheco. Praxedis stabbed Pacheco five times in the torso and returned the knife to his pocket.

Sergio Flores, a security guard, escorted Praxedis and his cohorts outside to their car. Pacheco was transported to the hospital where he succumbed to his injuries. The taqueria's surveillance camera recorded the stabbing; that video was not transmitted to this court for us to review. An autopsy later revealed Pacheco died from a stab wound to the heart and blunt force head trauma.

Detectives Roland Andrade and Clinton Achziger interviewed Praxedis at the police station and advised him of his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). Praxedis said he carried a knife for protection. Praxedis identified the men he was with at the taqueria by their birth names and gang monikers. Praxedis said he was afraid for his family because of the information he was providing. He denied being a member of “KOS” or “Knight Owls,”¹ but he did know of the gang. He said KOS stood for Knight Owls, it had more than three members, its rival was “Del High.” He described an incident where a KOS gang member was arrested for having a rifle. When asked about his moniker, Praxedis said they call him “Basic Person” because he does not shave his head or dress like a gang member. When Andrade asked him what it meant to “represent,” Praxedis explained that if someone disrespects the gang, the associate is expected to respond to the disrespect and represent the gang. Praxedis admitted he stabbed Pacheco twice and he was aware stabbing could result in death, but he did not care. When Andrade asked him whether he was acting as a back up when he entered the taqueria from the outside portion of the restaurant, he answered, “Yes.”

An information charged Praxedis with murder for a criminal street gang purpose (Pen. Code, §§ 187, subd. (a), 190.2, subd. (a)(22))² (count 1), and street terrorism (§ 186.22, subd. (a)) (count 2).³ As to count 1, the information alleged Praxedis personally used a knife with the specific intent to promote a criminal street gang.

¹ The gang is referred to as “Knight Owls” and “Night Owls” throughout the record. Because the evidence at trial established the gang also uses the abbreviation “KOS,” we will refer to the gang as “Knight Owls.”

² All further statutory references are to the Penal Code.

³ The information also charged Hernandez, Garcia, Ortega, and Mejia with the same offenses. All Praxedis’s codefendants pled guilty after the trial concluded in this case.

Before trial, Praxedis filed a motion to sever the gang charges from the murder charge and try them separately. The prosecutor opposed the motion. The trial court denied Praxedis's motion. The court also denied his request to prohibit the prosecutor from asking the gang expert hypothetical questions based on the facts of this case and to prohibit the expert from offering an opinion whether Praxedis was an active participant in a gang.

At trial, the prosecutor played the surveillance video during Osoirio's and Cervantes's testimony and asked them questions about the incident. On cross-examination, Osoirio testified he never heard any gang names or saw any gang signs. Neither did Cervantes. Cervantes stated he had never been in a gang but he would "back up" a friend who was being attacked.

Flores testified he told police officers that he heard one of the men yell a three letter gang name that started with the letter "V" and one of the men made gang signs that resembled the letter "M." On cross-examination, Flores admitted he did not remember what gang name they said, "but they said something."

During trial, the prosecutor also moved to admit a codefendant's statement as a basis from which an expert witness could offer any opinion. The prosecutor cited a number of cases but did not identify the codefendant or the statement. At a hearing on the motion, defense counsel objected to admission of evidence Ortega yelled "Knight Owls" during the fight. Counsel argued admission of the evidence violated *Crawford v. Washington* (2006) 541 U.S. 36 (*Crawford*). The trial court ruled evidence of Ortega's statement was admissible as a basis for expert opinion but not for its truth. The court explained that because the statement would not be admitted for its truth, *Crawford* was not implicated. The court stated it would give the jury a limiting instruction at the appropriate time.

Achziger testified he interviewed Ortega at the police station. After Achziger advised him of his *Miranda* rights, Ortega admitted his involvement in the

fight. Achziger stated that when he asked Ortega whether he said anything during the fight, Ortega replied, “he believed during the altercation he did throw out his gang name of [Kn]ight Owls.” The trial court instructed the jury with the following: “Ladies and gentleman, the witness’s testimony regarding the statement of . . . Ortega can be considered by you only for a limited purpose. Later this morning you are going to hear from the prosecution’s gang expert. A gang expert is going to rely on certain information and render opinions that she will offer to you. You can consider the statement of . . . Ortega to this detective for the limited purpose of evaluating the expert witness’s reliance on that statement in rendering an opinion offered to you. You can consider it for that purpose and for no other purpose.”

Achziger testified Ortega admitted to being a KOS gang member. After Achziger testified he did not listen to the tape of the interview before testifying, defense counsel cross-examined him about his level of certainty as to whether Ortega claimed gang membership during the fight. Counsel then asked Achziger whether Ortega said Praxedis was not a gang member, the prosecutor objected, and there was a discussion in chambers.

In chambers, the prosecutor stated he limited his questioning to whether Ortega was a gang member but counsel “opened the door” by questioning Ortega about Praxedis’s gang affiliation. Defense counsel argued he previously objected to admission of Ortega’s statement he claimed Knight Owls during the incident and the prosecutor could now use the statement for an improper purpose. The trial court agreed with the prosecutor. When questioning resumed, counsel asked Achziger whether he would listen to the tape of the interview to determine whether Ortega made any statements concerning Praxedis’s gang affiliation. Achziger agreed. On redirect examination, Achziger testified Ortega said he was “back[ing] up” KOS during the fight. He also said part of being a gang member is knowing you may have to kill someone and it was Pacheco’s time to die.

Andrade testified concerning his interview with Praxedis and his training and experience concerning criminal street gangs. He testified “back up” is when a gang member assists other gang members in committing a crime. He stated a gang moniker is a gang nickname. He explained that based on his experience investigating gang crimes, gang members are often fearful their family will be retaliated against if they provide information to police. He said “jumping in” is how people are initiated into a gang.

Detective Patricia Navarro testified for the prosecution as its gang expert. After detailing her background, training, and experience, Navarro testified concerning the culture and habits of Hispanic criminal street gangs, including the concept of respect, levels of participation, and hit ups.

Navarro opined respect is “one of the corner stones” of gang culture and it is earned by committing crimes and instilling fear in their own gang members, rival gang members, and the community. She said respect equals fear and the more violent the crime the more the gang member is feared. Navarro explained that if a rival gang member or community member disrespects a gang member, the gang member must retaliate violently or the gang member will “lose face.” Navarro stated there are different levels of gang participation, including active participants, associates, and people who would back up a gang. She said a gang hit up, such as asking someone where they are from, always leads to violence.

With respect to Knight Owls, or KOS, Navarro testified she had investigated that gang, spoken with its members, spoken with other law enforcement about the gang, and observed its symbols, “K-O-S.” She said it had more than three members and its primary activities were weapons violations and felony vandalism. After detailing numerous acts of KOS felony vandalism, which included their symbol Vario KOS and VKOS, Navarro testified that in 2010 codefendant Hernandez was arrested for possessing an illegal firearm; he was with codefendant Garcia and another KOS member. She added that in 2011, two other KOS members were arrested for

weapons violations and in 2009 the founder of KOS was arrested for making terrorist threats. Based on certified court documents, she stated the following: in 2011, KOS gang member Juan Garcia fired shots at two members of another gang because they disrespected Garcia's fellow gang member; and in 2010, KOS member Hernandez possessed an unregistered firearm. Based on her investigation, Navarro opined KOS was a criminal street gang.

As to this offense, Navarro testified she investigated all the defendants, Hernandez, Praxedis, Ortega, Garcia, and Mejia, and another man who had not been arrested, Christopher Espino. She reviewed police reports, field identification cards, and STEP notices. She opined Hernandez (statements and contacts with other KOS members), Ortega (self-admissions and KOS tattoos), Garcia (self-admissions and KOS tattoos), Mejia (knowledge of KOS and its members), and Espino (documented KOS member and contacts with other KOS members) were active participants in KOS on the night of the incident.

With respect to Praxedis, Navarro testified that in 2009, Praxedis was involved in a fight where someone from his group yelled, "Knight Owls." Navarro testified she listened to Andrade's interview with Praxedis and reviewed the transcript and when Praxedis mentioned knowing a KOS gang member who was arrested for possessing a rifle, he was referring to the 2010 crime involving his codefendants Hernandez and Garcia. Navarro opined Praxedis was an active participant in KOS on the night of the incident because of the following: his participation in the offense; he acted in concert with five other KOS members; he acted as back up to commit the crime; and his statements to Andrade, including he admitted to backing up KOS.

Based on a hypothetical question mirroring the facts of the case, including that one of the attackers believed he said "[Kn]ight Owls" during the fight, Navarro opined the offense was committed in association for the gang because the attackers acted in concert to commit the crime. She said one of the men hit up the group, one of them

claimed their gang during the fight, one of the men stabbed the victim, and when they left one or more of the men again claimed their gang. She also believed the crime was committed to promote criminal conduct for members of the gang because after the gang hit up and claiming of the gang, the men committed a violent act that promotes their gang and instills fear in rival gang members and the community. She concluded the men were assisting each other because they each played a role. The prosecutor gave Navarro an additional fact to consider, that the person with the knife later admitted he acted as back up, and asked whether “there [was] a division of labor wherein gang members are assisting each other?” Navarro answered, “Yes.”

After the trial court overruled defense counsel’s objection to admission of the hypothetical questions on the grounds Navarro improperly testified as to intent in violation of *People v. Killebrew* (2002) 103 Cal.App.4th 644, cross-examination began. Navarro admitted Praxedis had no previous gang contacts with law enforcement, i.e., no field identification cards or STEP notices, and no prior gang convictions. She did not interview his family, friends, or employer. She stated KOS started as a tagging crew and party crew and KOS stood for “Kings of Style.” She acknowledged Praxedis denied being jumped into the gang, he did not have any KOS tattoos, and he did not possess any KOS paraphernalia. Navarro acknowledged Praxedis’s nickname was “Basic Person” because he did not behave or look like a gang member.

Praxedis offered the testimony of numerous witnesses. Jaime Flores (Jaime), a security guard, testified on direct examination he did not recall anyone yelling any gang names but he did hear someone yell “Sinaloa.” On cross-examination, after his recollection was refreshed with a police report, Jaime testified he saw five “chollos” or “gangsters” get into a car and yell a three-letter gang name.

Achziger testified he listened to his interview of Ortega. He said Ortega stated he “‘probably’” said Knight Owls. Ortega also said Praxedis “‘doesn’t bang.’”

Two of Praxedis's close friends testified they believed him to be peaceful, nonviolent, and calm. When the prosecutor showed them the surveillance video on cross-examination, both agreed those were not the actions of a nonviolent person.

An officer who interviewed Osoirio testified Osoirio told him the confrontation started because Praxedis's group did not like the fact Osoirio's group was looking at girls they were with.

Finally, Praxedis testified on his own behalf. Praxedis stated Ortega and Mejia are his cousins and he went to school with Hernandez and Garcia. He denied being a member of KOS, being jumped into KOS, having any KOS tattoos, or having any interest in KOS. He knew though some of the guys he was with that night were associated with KOS and had KOS tattoos. As to the night of the incident, he said that after they drank, they decided to eat and look for girls. He said that after someone in Pacheco's group said something to them, Hernandez went inside to talk to them. He said that after the others went inside, he followed his cousin Ortega because he was a minor. He did not see anyone throw any gang signs or hear anyone claim gang membership. He pulled out the knife for protection because he was afraid one of the men was armed or one of them would attack them because one of the men was big. He said his mindset was to protect his family and friends and not to kill anyone. He admitted he "slashed" Pacheco. He intended to "back up" his family and friends but not KOS. He denied representing KOS that night and denied it was a gang knife.

On cross-examination, Praxedis admitted he told Andrade that he blacked out and could not remember what he was thinking but at trial he could remember his mindset was to protect his family and friends. He clarified he freaked out that night and did not black out. He admitted he had family and friends that were KOS members and Ortega and Garcia had KOS tattoos. He also admitted he was familiar with what crimes KOS commits and its graffiti. When the prosecutor asked him why he told Andrade that he would act as back up for KOS, he claimed it was because he was tired of answering

questions. Praxedis said he was backing up friends but he acknowledged the people he was backing up were KOS members. He agreed he could have put the knife down and walked away, but he said everything happened so fast. When the prosecutor said the video showed Praxedis moving people out of the way to get to Pacheco and it was 18 seconds from the time he took out the knife to the time he stabbed Pacheco, Praxedis did not remember moving people and said he “thought [he] was going to slash him.”

During closing argument, the prosecutor argued Praxedis was guilty of express malice first degree murder. The prosecutor asserted this was a gang offense and explained how the evidence demonstrated Praxedis was an active participant in KOS on the day of the offense. Defense counsel argued this was neither a murder case nor a gang case. Counsel asserted there was no evidence that established Praxedis was a gang member and the act of backing up is not limited to gang members but also includes family and friends. Counsel argued Ortega did not say “Knight Owls” during the fight but detectives tricked him into thinking he did. Counsel argued Praxedis was not guilty of murder but instead manslaughter. During rebuttal argument, the prosecutor reminded the jury of the video showing a scared Osoirio fleeing and hiding and Cervantes trying to pull attackers off Pacheco. The prosecutor added there was no evidence to support the conclusion he was backing up his family and friends from attack when he participated in the attack by stabbing a defenseless Pacheco. The prosecutor juxtaposed Cervantes backing up his friend Pacheco with Praxedis backing up his fellow gang members.

The trial court instructed the jury on murder, street terrorism, and the relevant allegations. As relevant here, the court instructed the jury it could not consider Ortega’s statement to Achziger for its truth but only to evaluate Navarro’s opinion.

The jury convicted Praxedis of counts 1 and 2 and found true all the enhancements. The trial court sentenced Praxedis to prison for life without the possibility of parole on count 1. The court stayed the sentence on count 2 and the section 186.22,

subdivision (b)(1), enhancement. The court struck the punishment on the section 12022, subdivision (b)(1), enhancement.

DISCUSSION

I. Confrontation Clause

Relying on *Crawford, supra*, 541 U.S. 36, and *People v. Archuleta* (2014) 225 Cal.App.4th 527 (*Archuleta*), Praxedis argues his Sixth Amendment confrontation rights were violated when the trial court admitted Achziger's testimony Ortega said "Knight Owls" during the attack and Navarro improperly relied on Ortega's statement to opine the crime was gang related because he could not examine Ortega at trial. This issue is currently pending before the California Supreme Court in a case out of this court *People v. Sanchez* (2014) 223 Cal.App.4th 1 (*Sanchez*), review granted May 14, 2014, S216681. Additionally, the Supreme Court granted review in *Archuleta*, review granted June 11, 2014, S218640, and deferred any further action pending resolution of *Sanchez*. In other words, the case Praxedis relies on to support his claim is no longer good law. Because the issue is currently pending before the California Supreme Court and the state of the law is uncertain, we decline Praxedis's invitation to speak on the issue. We conclude Praxedis was not prejudiced by any error.

We review violations of a criminal defendant's Sixth Amendment confrontation rights under the standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 24—reversal of the judgment is required unless the prosecution can show "beyond a reasonable doubt" that the error was harmless. (*People v. Rutterschmidt* (2012) 55 Cal.4th 650, 661.) That standard is met here because there was sufficient evidence, apart from Ortega's statement, this was a gang attack.

Preliminarily, we note Praxedis acknowledges "there was some . . . evidence of gang aspects to the case" but he characterizes it as "underwhelming." It is not so underwhelming though that he felt compelled to raise any sufficiency of the evidence arguments. He did not.

The street terrorism substantive offense, section 186.22, subdivision (a), has three elements: (1) active participation in a criminal street gang; (2) knowledge the gang's members have engaged in a pattern of criminal gang activity; and (3) willfully promoting, furthering, or assisting in any felonious criminal conduct by members of the gang. (*People v. Albillar* (2010) 51 Cal.4th 47, 56 (*Albillar*).)

The street terrorism enhancement has two elements: The first element requires proof the charged offense was committed for the benefit of, at the direction of, or in association with a criminal street gang. (*Albillar, supra*, 51 Cal.4th at pp. 54-55.) The second element requires evidence the charged offense was committed with the specific intent to promote, further, or assist other criminal conduct by members of the gang. (*Id.* at pp. 51, 66-68.) Expert testimony is admissible to prove the gang offense and enhancement. (*People v. Vang* (2011) 52 Cal.4th 1049 (*Vang*).)

Praxedis does not dispute there was evidence Knight Owls was a criminal street gang as statutorily defined or that he had knowledge Knight Owls gang members engaged in a pattern of criminal gang activity. The dispute is whether Praxedis was an active participant in KOS and promoted felonious criminal conduct by gang members and whether he did so for the benefit of and with the specific intent to promote KOS. In other words, the issue is whether this was a gang attack or simply a fight over a young woman. We conclude the prosecutor presented sufficient evidence from which the jury could reasonably conclude it was the former.

When Hernandez confronted Pacheco and his friends, he asked them where they were from. Navarro testified that in Hispanic gang culture asking where someone is from is a classic gang hit up, or challenge, which always leads to violence. After Garcia, Ortega, Mejia, and Praxedis arrived and further words were exchanged, they attacked Pacheco. Navarro testified that based on her investigation, Hernandez, Garcia, Ortega, and Mejia were all members of KOS based on their prior convictions, their prior law enforcement contacts, their tattoos, their associations with other KOS gang members,

their involvement in this crime, and/or their admissions. After the group hit Pacheco, Praxedis took a knife that he had removed from his pocket and unfolded the blade and stabbed Pacheco five times in the torso. Praxedis admitted to Andrade that he was acting as back up. Andrade explained that when a gang member assists other gang members in committing a crime the gang member is providing back up. As Pacheco and his confederates fled the scene, Flores, the security guard, saw one of the men flash what appeared to be a gang sign and heard one of the men yell a three letter gang name that started with the letter "V." Navarro testified she had seen Knight Owls graffiti that stated VKOS. Jaime, another security guard who testified for Praxedis, confirmed he heard one of the men yell a three-letter gang name.

With respect to Praxedis, the jury heard evidence that a few years before the incident here, he was involved in a fight where someone from his group yelled "Knight Owls." Based on this and other evidence concerning the incident here, including that Praxedis admitted to backing up five KOS gang members in the attack, Navarro opined Praxedis was an active participant in KOS on the night of the incident. Navarro also relied on this evidence to conclude the offense was committed to promote criminal conduct by members of the gang and in association with and with the specific intent to assist gang members because each gang member carried out his role in the attack. This evidence, without considering Ortega's statement, was sufficient for the jury to conclude Praxedis was an active participant in KOS on the night of the crime and this was a gang attack. Contrary to Praxedis's claim otherwise, this was not simply a group of young men raising their feathers and displaying their plumage to impress the attractive young women at the taqueria. Instead, the evidence demonstrates this was an orchestrated gang attack where each participant played a role in executing the crime despite Praxedis's attempt to provide an alternate inference for every piece of damaging evidence.

As to the murder charge, we are convinced beyond any doubt Ortega's statement did not contribute to the jury's first degree murder verdict. The jury saw a

video of Praxedis's group attacking Pacheco. The video showed the following: Praxedis taking a knife out of his pocket and unfolding the blade; Praxedis moving people out of the way so he could get to Pacheco; and 18 seconds pass between the time he unfolded the blade to the time he stabbed Pacheco five times in the torso. Admission of Ortega's statement did not contribute to the jury's guilty verdict on count 1. Thus, we are convinced beyond a reasonable doubt that admission of Ortega's statement was harmless.

II. Propriety of Gang Expert Opinion

Relying on *People v. Killebrew* (2002) 103 Cal.App.4th 644 (*Killebrew*), while recognizing the *Vang* court limited its holding, Praxedis contends the trial court erred in admitting Navarro's testimony on his intent and his guilt. We disagree.

In *Killebrew*, the court held the gang expert improperly testified to defendant's subjective knowledge and intent. (*Killebrew, supra*, 103 Cal.App.4th at pp. 657-658.) In *Vang*, the Supreme Court discussed the limited significance of *Killebrew*. (*Vang, supra*, 52 Cal.4th at p. 1047.) "To the extent *Killebrew* . . . purported to condemn the use of hypothetical questions, it overlooked the critical difference between an expert's expressing an opinion in response to a hypothetical question and the expert's expressing an opinion about the defendants themselves." (*Id.* at p. 1049.) "[E]xpert testimony is permitted even if it embraces the ultimate issue to be decided. [Citation.]" (*Ibid.*) The jury must still decide whether to credit the expert's opinion at all, and "whether the facts stated in the hypothetical questions are the actual facts, and the significance of any difference between the actual facts and the facts stated in the questions." (*Id.* at p. 1050.)

Here, Navarro did not testify as to Praxedis's subjective intent or his guilt. Praxedis cites to a few instances where in response to hypothetical questions Navarro stated the offense was committed in association with the gang, "they" all have roles and are acting in concert, and "they" want people to know they are from a particular gang. Navarro's responses were permissible expert testimony in response to the hypothetical questions. She did not testify Praxedis possessed the specific intent to benefit KOS or

that he was guilty. There was one instance where Navarro's testimony crossed the line but the trial court quickly struck the testimony.

When the prosecutor asked Navarro whether pursuant to the hypothetical question the gang members were assisting each other, Navarro stated each gang member had a role and after everyone attacked the victim, "You've got one individual that comes in with a weapon. Everybody has a role. *He knows what he has to do.*" (Italics added.) After defense counsel requested a sidebar, the trial court immediately admonished the jury to disregard "'He knows what he has to do.'" The court's immediate admonishment cured this isolated error. Thus, the court did not err in admitting Navarro's testimony, which although it embraced the ultimate issue to be decided by the jury, did not usurp the jury's role as the exclusive trier of fact because she did not testify as to Praxedis's subject intent or his guilt. (*Vang, supra*, 52 Cal.4th at p. 1048 [""Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact""].)

DISPOSITION

The judgment is affirmed.

O'LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

THOMPSON, J.